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In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

The Supreme Court of Nevada held in this case that the actions of the National Collegiate Athletic Association ("NCAA"), taken against the University of Nevada, Las Vegas ("UNLV") for violation by its head basketball coach, Jerry Tarkanian, of rules adopted by member universities, violated 42 U.S.C. §1983 and the due process clause of the Fourteenth Amendment to the Constitution of the United States of America. Because enforcement of NCAA rules and regulations applicable in all fifty states can be thwarted by idiosyncratic construction of the U.S. Constitution and statutes by a state court if there is no review by a federal court, this Court should consider the following questions:

1. Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

2. Whether the NCAA and UNLV provided Jerry Tarkanian the process due him by granting him the opportunity to hear the charges against him and to respond in a meaningful way during five separate hearings, where the hearings resulted in UNLV temporarily suspending his head basketball coaching duties for two years, even though the NCAA failed to present its evidence at the hearings by affidavits of witnesses.

3. Whether rights created by state law, or only rights created by the U.S. Constitution, are protected by substantive due process and, if the former, whether Nevada courts erred in finding that the decisions of the NCAA

committee on Infractions and Council were arbitrary and capricious where the Nevada courts did not examine the information relied on by the Committee and Council to determine whether the decisions were supported by evidence.

4. Whether U.S. District Courts should be permitted to inquire whether a defendant was joined, or an indispensable party was not joined, for the sole purpose of defeating removal of a federal question action from state courts to a U.S. District Court, notwithstanding that an originally-named defendant declined to timely remove the case.

5. Whether the federal question removal statute, 28 U.S.C. §1441(a), should be interpreted to authorize an indispensable party to remove an action to federal court within 30 days of joinder, despite the failure of an originally-named defendant to timely remove.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

OPINIONS BELOW

The 1979 Opinion of the Supreme Court of Nevada (App. E, *infra*) is reported at 95 Nev. 389, 594 P.2d 1159 (1979). The 1987 Opinion of the Supreme Court of Nevada (App. B, *infra*) is reported at 741 P.2d 1345 (Nev. 1987). The 1980 (App. H, *infra*) and 1984 (App. J, *infra*) orders for remand by the United States District Court for the District of Nevada are not reported. The orders of the United States Court of Appeals for the Ninth Circuit (App. M, N, *infra*) are not reported.

JURISDICTION

The judgment of the Supreme Court of Nevada (App. B, *infra*) was entered on August 27, 1987. This Court granted petitioner an extension of time to and including December 25, 1987 to file its petition for writ of certiorari. (App. A, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS STATUTES INVOLVED

Amendment XIV to the United States Constitution states, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The National Collegiate Athletic Association ("NCAA") is a private, voluntary association consisting of nearly 1,000 public and private colleges and universities, athletic conferences and associations and other educational institutions. It was founded near the turn of the century in response to public outcry about the increasing violence, injury and professionalism in college football. It has since expanded to encompass literally dozens of college level sports, and thousands of participating coaches and student athletes.

In the early 1950s, a self-policing enforcement program was established by NCAA members to control perceived abuses in the professionalization of college athletes and to govern the recruitment, admissions, financial aid and eligibility of student athletes by member colleges and universities. Under the rules, coaches and their staffs are prohibited from offering recruits payment or other incentives to attend their colleges and universities, or to provide enrolled athletes extra benefits not made available to the student population in general.

The NCAA received information in 1972 that the University of Nevada - Las Vegas ("UNLV"), had violated the rules regarding recruiting and extra benefits. The NCAA Committee on Infractions authorized its enforcement staff to investigate these allegations. The President of UNLV was notified of the preliminary inquiry on November 28, 1972. NCAA investigators found substantial and reliable information that violations had occurred. The Committee on Infractions issued to UNLV an Official Inquiry on February 25, 1976. The official inquiry directed the University to investigate each of the 72 detailed allegations set out in the inquiry, a number of which regarded respondent, Jerry Tarkanian (hereafter "Tarkanian"), and to respond by June 1, 1976. A supplemental inquiry containing six additional items was later forwarded to UNLV.

After two extensions of time were granted, UNLV submitted to the Committee on Infractions an official response. The response denied each allegation regarding Jerry Tarkanian. In addition, the University also questioned the veracity and integrity of the investigators.

The Committee on Infractions considered the allegations in a hearing lasting three days over a one month period. Tarkanian was present for all three days of the hearings, two of them with his attorney present. He and his attorney were allowed to speak and to present oral

and written evidence to refute the testimony presented by the staff investigators. After deliberating, the Committee found the University in violation of NCAA rules regarding recruiting and extra benefits for student athletes, including ten rule violations by Tarkanian.[1] The Committee issued its findings in Confidential Report Number 123 (47), directed to the President of UNLV, which recommended sanctions against the University. Among the sanctions recommended was an Order to Show Cause why UNLV should not suspend Tarkanian from coaching for a period of two years.

The University appealed certain findings and penalties, including all involving Tarkanian, to the NCAA's governing body, the Council,[2] in May 1977. Following a lengthy hearing, at which Tarkanian appeared with counsel, the Council unanimously affirmed the findings and penalties of the Committee on Infractions. The University was again ordered to show cause why it should not suspend Tarkanian for two years.

On September 6, 1977, UNLV conducted a hearing to determine whether to follow the NCAA's directives. Reluctantly, UNLV adopted the findings and penalties of the NCAA, and suspended Tarkanian from his coaching duties for two years, effective September 8, 1977.

Tarkanian brought suit against UNLV on September 8, 1977, in the Eighth Judicial Circuit, Clark County, Nevada. The NCAA was not joined in that action and UNLV refused to remove the action to federal court.

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1. Among other infractions, it was found that Tarkanian had arranged a grade of "B" for a student athlete, illegally recruited at least two prospective athletes, provided free airline transportation for at least one student athlete, pressured one athlete and his family to not cooperate with the NCAA and falsely certified his program was in compliance with NCAA rules.

2. The NCAA Council was composed of sixteen faculty members from NCAA member schools.

Tarkanian sought injunctive relief from the sanctions imposed by the University the day before. The NCAA hearing, he contended, had violated his right to counsel, to confront witnesses, to an impartial fact finder and to other rights guaranteed by the Fourteenth Amendment. The University's reliance on the NCAA's findings, he argued, was therefore also constitutionally infirm. The Trial Court granted Tarkanian's injunctive relief, based upon the legal briefs and joint stipulations of fact of the parties. The Nevada Supreme Court reversed for failure to join an indispensable party, the NCAA.

Tarkanian commenced the second phase of this lawsuit in July 1979 against both UNLV and the NCAA. Within 30 days, the NCAA and UNLV filed a joint petition for removal to the United States District Court for the District of Nevada. The case was remanded on motion of Tarkanian, for failure of UNLV to timely remove, in that it had failed to remove within 30 days of receipt of service of process in 1977.

Following remand, the case proceeded to trial in State Court. After a two-week bench trial, the Judge agreed with Tarkanian on most issues. He issued an opinion on June 25, 1984 that the actions of the NCAA constituted state action and that Tarkanian had been deprived of liberty and property interests without procedural and substantive due process of law, all in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the Constitution. He permanently enjoined the University and the NCAA from suspending Tarkanian, and from taking any action to enforce its sanctions. He later awarded attorney's fees of nearly $200,000.00 to Tarkanian.

The NCAA filed a second petition for removal on July 17, 1984 for two reasons. First, it had become apparent at the second trial that the University had been

joined as the only original defendant for the purpose of thwarting removal by the NCAA, and that it should be realigned as a plaintiff. Second, Tarkanian's request for attorney's fees under 42 U.S.C. §1988 constituted a new and independent federal action for removal. The Federal District Court disagreed, and again remanded the case to State Court for failure of UNLV to timely petition for removal.

The Trial Court's judgment was appealed by the NCAA to the Nevada Supreme Court. The Supreme Court, in an opinion issued August 27, 1987, affirmed. (App. B, *infra.*) First, it found the NCAA to be a state actor despite the trend of this Court to limit or narrow the definition of state action. Second, it found NCAA procedures did not afford Tarkanian "due process of law" under "the circumstances of the case." It limited the injunction to those penalties imposed with respect to Tarkanian in Confidential Report Number 123(47) and UNLV's adoption of those penalties. It also remanded the issue of attorney's fees to the State Court for further determination.

REASONS FOR GRANTING THE PETITION

I. Is the NCAA a State Actor?

It is firmly embedded in our constitutional heritage that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948). The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. *Blum v. Yaretsky,* 457 U.S. 991, 1002 (1982). Critical to respondent's due process claims is the more fundamental issue of whether the NCAA's actions constitute state action. For if he cannot show this, his constitutional claims must fall.

Originally, this Court's test for state action was broad. Indirect involvement by state governments could make conduct normally considered to be private action into state action. Under this "entanglement" theory, a private actor became intertwined with government policies and regulations. This entanglement did not require exclusive or even direct government involvement. State action could be found even though the government's participation was peripheral or was only one of several cooperative forces leading to a constitutional violation. *United States v. Guest,* 383 U.S. 745, 755-56 (1966).

It was against this backdrop that early cases determined that the NCAA was a state actor. *Parish v. NCAA,* 506 F.2d 1028 (5th Cir. 1975); *Howard University v. NCAA,* 510 F.2d 213 (D.C. Cir. 1975); *Associated Students, Inc. v. NCAA,* 493 F.2d 1251 (9th Cir. 1974); *Regents of University of Minnesota v. NCAA,* 560 F.2d 352 (8th Cir. 1977), *cert. dismissed,* 434 U.S. 978 (1977). These cases were premised on the theory that one-half of the members of the NCAA were state-supported universities, providing the necessary government entanglement.

This Court changed the rules of the game in 1982. Now, in order to establish state action, a party must establish one of two things: (1) the private actor is serving a function which is traditionally and exclusively a state function; *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982); *Blum v. Yaretsky,* 457 U.S. 991 (1982); or (2) the state exercised coercive power or provided such significant encouragement, either overt or covert, that the action must in law be deemed to be that of the state. *San Francisco Arts & Athletics, Inc. v. U. S. Olympic Committee,* 483 U.S. ..... (1987).

The courts have struggled with the determination of what actions are traditionally and exclusively state actions. The court below, for instance, held that respondent's temporary suspension from coaching basketball is such a traditionally and exclusively state function. It termed the NCAA's action a "personnel decision."[3]

The propriety of the decision of the court below is questionable. Cases decided since *Rendell-Baker* and *Blum* have routinely held that the NCAA's regulation of intercollegiate athletics is *not* a traditionally and exclusively state function. *See, Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984); *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986); *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987); *McHale v. Cornell University*, 620 F.Supp. 67 (N.D. N.Y. 1985); *Kneeland v. NCAA*, 650 F.Supp. 1047 (W.D. Tex. 1986); *Vanelli v. NCAA*, No. 3-84-1680 slip op. (D. Minn. Sept. 25, 1985); *Hawkins v. NCAA*, 652 F.Supp. 602 (C.D. Ill. 1987); *Barbay v. NCAA*, No. 86-5697 (E.D. La. Jan. 20, 1987). This should be sufficient to preclude application of state action to the NCAA.

Even more persuasive is this Court's recent decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, supra.* In that case, the SFAA decided to produce and sponsor the "Gay Olympic Games." Congress gave exclusive control over the word "Olympics" to the United States Olympic Committee ("USOC") in

3. This myopic view of the NCAA's function in regulating intercollegiate athletics points up the way in which a court can manipulate the test to reach the desired result. The NCAA membership rules merely establish minimum guidelines which institutions and their employees, including coaches, agree to follow. If the institution chooses not to follow the rules, it is subject to sanctions, to which it has also previously agreed. The situation is no different from the regulation and administration of the LSAT test by a private company, on which virtually every law school, public or private, relies for admission, which function has been held not to be state action. *Johnson v. Educational Testing Service*, 754 F.2d 20 (1st Cir. 1985), *cert. denied*, 472 U.S. 1029 (1985).

1976. When the USOC prohibited the California group's use of the word, the SFAA filed suit. The USOC's prohibition, it contended, was discriminatory in violation of the Fifth Amendment. The USOC countered that it was not a governmental actor. This Court ruled that the USOC was not a governmental actor, despite being federally chartered, federally subsidized and federally monitored.

Further, this Court held that "neither the conduct nor the coordination of amateur sports has been a traditional governmental function." *Id.* We submit that the function and purpose of the United States Olympic Committee is analogous to that of the NCAA, while the "entanglements" are far less. Both are private organizations. Both regulate amateur athletics. Neither are state actors. Regrettably, *San Francisco Arts* did not offer this Court an opportunity to further define what actions are traditionally and exclusively state functions. The instant case offers this Court a unique opportunity to further clarify this important area of law.

The Court below also misapplied the second test of state action. Justice White, in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), noted that this Court has articulated a number of different factors or tests of state action in different contexts.[4] The Nevada Supreme Court applied a totally inappropriate state action test taken from *Lugar*. *Lugar* involved a challenge under 42 U.S.C. §1983 to prejudgment attachment under Virginia law. The attachment there was issued by a court clerk, acting on an *ex parte* petition. Thirty-four days later, the trial judge dismissed the attachment for failure of defendant to establish the statutory requisites. This Court found state action by the party seeking the attachment in that it had

4. Justice White noted the "public function" test, the "state compulsion" test, the "nexus" test and, in the case of prejudgment attachments, the "joint action" test. *Lugar, supra*, at 939.

jointly participated with state officials *under Virginia state law* to deprive petitioner of his rights. This Court expressly noted that its holding was "limited to the particular context of prejudgment attachment." *Id.* at 940, n.21.

The Court below tortured the facts before it in an attempt to bring this case under the *Lugar* test. The NCAA, it held, acted under state law in that UNLV impliedly authorized the sanctions against Tarkanian. (App. B, *infra.*) In addition, it ruled that the NCAA could be fairly said to be a state actor because UNLV delegated personnel decisions to it. (App. B, *infra.*) It then stretched the *Lugar* test to cover these facts.

San Francisco Arts made it clear that the state must have a direct impact on the private actor in order for the private conduct to constitute state action. Simple acquiescence in or approval of the private action is not sufficient. Neither respondent nor the Nevada Supreme Court seriously suggest that UNLV or any other state agency coerced or even encouraged the action taken by the NCAA. In fact, UNLV fought the NCAA long and hard.

Nor did the action taken against Tarkanian result from any state law or regulation. The NCAA is not an agency which is established by or subject to any state government. It is a voluntary association governed by its own conventions and elected committees, which diminishes the extent to which any one school can dominate. This does not suggest that, through membership, public universities have no involvement in NCAA decisions. Of course, they do. However, such input does not rise to the level of coercive power such that the decision made against respondent must be deemed to be that of the state itself.

Although the Nevada Supreme Court is out of step with the times, its error is perhaps attributable in part

to the need for a clear test of state action. Articulation of a clear test is important to all private organizations that deal with the government, yet want to maintain their private status. For this reason, certiorari is warranted in this case.

The governance of intercollegiate athletics to insure minimum standards for scholarship, sportsmanship and amateurism is a national concern. No statute or governmental rule-making agency provides these standards. For years the majority of the nation's colleges and universities, as members of the NCAA, have voluntarily adopted rules governing recruiting, admission, eligibility and financial aid of student-athletes. This court in *NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85 (1984) recognized the public interest served by the NCAA. The interstate nature of the association requires, however, that its rules be subject to uniform application and construction of applicable laws by the courts. Its members are located in all fifty of the United States. Since the association is unincorporated and private, it is subject to suit in every state. It cannot claim diversity jurisdiction and is thwarted often in removing a federal question from state to federal court jurisdiction. It is generally accepted that the NCAA performs a laudable purpose in governing intercollegiate athletics and that its governance is not state action absent a showing a state "directed" or "coerced" certain NCAA conduct.

Even so, certain state courts, and some U.S. District Courts (perhaps because of parochial interests in protecting the local team, coach, athlete, or alumnus) do, consciously or unconsciously, provide a home court advantage. This situation requires that this Court announce clearly to lower courts that the NCAA's governance of amateur sports is not a function traditionally reserved to the various states and that the imposition of sanctions

upon a member institution, even though it affects a coach's duties or the eligibility or financial aid of a student-athlete, does not constitute a symbiotic relationship with a public college or university.

The Fourth Circuit in *Arlosoroff*, the Sixth Circuit in both *Graham* and *Karmanos*, and various U.S. District Courts in reported opinions have clearly applied this Court's holdings in *Blum* and *Rendell-Baker* to the NCAA's governance of intercollegiate athletics. Still, the Nevada Supreme Court ignored these decisions and tortured the language of *Lugar* in order to arrive at the decision that it was state action for the NCAA to direct UNLV to show cause why it should not temporarily suspend its basketball coach from his head coaching duties.

The Nevada Supreme Court held that the NCAA failed both prongs of the *Lugar* test. It said that "UNLV cannot escape responsibility for disciplinary action against employees by delegating that duty to a private entity." (App. B, *infra.*) Since Tarkanian was an employee of UNLV, the court reasoned that any act which affected his position as head coach was the performance of a function traditionally reserved to the state. Accordingly, the court held that NCAA was a state actor and its direction to UNLV that it report to the NCAA why it should not discipline Tarkanian for serious violations of its rules was an act traditionally reserved to the state.

The principal flaw in the court's ruling is its holding that Tarkanian's *employment* was affected by the NCAA. The sanction was against UNLV, and UNLV could have elected to suspend Tarkanian or to accept other sanctions. Further, his alleged tenure under Nevada law was for his position as a Professor of Physical Education, not as coach of the basketball team. Not satisfied with having tortured the first test of *Lugar*, the Nevada court mis-

construed the symbiotic relationship prong of the test to fit the facts of this case as well. In explanation, the court said only:

> By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.

(App. B, *infra.*) *Lugar*, however, holds that the conduct of which Tarkanian complains must be fairly attributable to the state. Section 1983 requires further that it be established that the conduct was under color of state law and that the alleged deprivation "resulted from the exercise of a right, privilege, or rule of conduct having its source in state authority." *Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632, 638 (10th Cir. 1983).

Here, the NCAA acted pursuant to and in enforcement of rules and procedures adopted by its members at annual conventions to insure minimum standards of scholarship, sportsmanship and amateurism in intercollegiate athletics. The NCAA rules were not a rule, regulation or policy of the State of Nevada. For the benefit of the Nevada Supreme Court and other similarly inclined courts, the membership of the NCAA has tremendous need for a clear pronouncement of the association's status as a state actor in carrying out its function of promulgating and enforcing the rules governing intercollegiate athletics adopted by its members.

II. Procedural Due Process

In addition to finding the NCAA a state actor, the Nevada Supreme Court also held that when Tarkanian "hotly" contested the NCAA's evidence that he violated NCAA rules, and produced signed affidavits contradicting

some of that evidence, the NCAA could not rely on oral presentation of statements made by witnesses to its investigators to find the coach in violation. At a minimum, it held, the NCAA should have produced written affidavits of those persons on whose testimony it relied, and its failure to do so in this case violated Tarkanian's right to procedural due process.

This decision points up a problem that is often present in procedural due process analysis - that is, no matter what procedures are followed, an unsuccessful litigant can always claim he should have received more.

Procedural due process "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). It is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Reduced to its simplest terms, procedural due process requires "a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

Neither Tarkanian nor the Court below contend that notice of the NCAA's allegations was inadequate. Rather, the question at issue is ultimately one of characterization. What opportunity to be heard must be afforded a college basketball coach before temporarily suspending him? Was Tarkanian given an opportunity to be heard at a meaningful time and in a meaningful manner?

To answer this, this Court requires three distinct factors be examined: First, the private interests that will be affected; Second, the risk of an erroneous deprivation through the procedure used and the probable value, if any, of additional or substitute safeguards; and finally,

the interest of the state actor, including the function involved and fiscal and administrative burdens that additional or substitute procedures would entail. *Mathews v. Eldridge, supra,* 424 U.S. at 335. We therefore look not only at the private interests affected, but also the interests of the state actor.

Unfortunately, the Court below focused only on the second factor. In holding that the NCAA must produce affidavits from its sources of information, the Nevada Supreme Court turned a microscope on one feature of the NCAA's enforcement procedure. By viewing one procedure in isolation, it missed the forest for the trees. Fault can be found with any set of procedures if the perspective is sufficiently myopic. The court below failed to view the whole framework to see if it was fundamentally fair. A brief review of all the protections afforded Tarkanian in this case will point up the fundamental fairness of the proceedings.

The NCAA, acting on information received, began its investigation of UNLV in 1972, before Tarkanian arrived. Following investigation by its Enforcement Division, the NCAA Committee on Infractions forwarded, pursuant to NCAA rules, an Official Inquiry to UNLV on February 25, 1976. The Official Inquiry set forth specific NCAA constitutional and bylaw provisions alleged to have been violated, followed by a recitation of specific acts relating to each specific allegation.[5] Some of these matters concerned Tarkanian.

UNLV, with the aid of Tarkanian, submitted a written response to the allegations. Thereafter, Tarkanian attended and participated in four administrative hearings before NCAA Committees. The first three hearings were presided over by the Committee on Infractions. The five

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5. The original Official Inquiry contains seventy-two allegations, and was supplemented by an Official Inquiry containing six additional inquiries.

members of the Committee on Infractions, who had served for many years and heard scores of cases, consisted of three law professors, and two academics from other disciplines.[6]

During the hearings, Tarkanian was allowed to have counsel present. He was allowed to question and cross-examine the investigators. He was allowed to present evidence and to argue his case. The hearings before the Committee, which took place over three days, totalled in excess of twenty hours.

Following the three hearings, the Committee notified UNLV of its findings and penalties on April 26, 1977. The Committee found thirty-eight violations by the University, including several by Tarkanian. Among other sanctions assessed, the university was ordered to show cause why Tarkanian should not be suspended from coaching intercollegiate basketball for two years.

The University exercised its right of appeal to the sixteen member NCAA Council. Both Tarkanian and the Committee on Infractions were permitted to make written and oral presentations to the Council. The Committee on Infractions prepared and presented to the Council the "Expanded Confidential Report," which detailed each violation and the evidence on which each finding was made. (App. R, *infra.*) Oral argument on the appeal was heard by the NCAA Council in August, 1977. The Council then deliberated, and voted 16-0 to adopt the Committee on Infractions' findings and sanctions.

Tarkanian had yet another opportunity to be heard. Pursuant to NCAA rule, a hearing was scheduled and con-

6. The members of Committee were Charles Alan Wright, constitutional expert and Professor of law at the University of Texas, William Mathews, Professor of law at the University of Kentucky, Harry M. Cross, Professor of law and Associate Dean at the University of Washington, John W. Sawyer, Professor of mathematics at Wake Forest University and Arthur Reynolds, Dean of the Graduate School, University of Northern Colorado.

ducted by UNLV. (App. O, *infra.*) Again, Tarkanian was given an opportunity to present evidence, to question and cross-examine witnesses, and to show cause why he should not be temporarily suspended. He was represented by counsel. Following the hearing, UNLV determined that it would adopt the findings and penalties of the NCAA. (App. P, Q, *infra.*) The next day, Tarkanian filed suit in Nevada state court.

In short, Tarkanian attended and participated in five hearings at which he was provided the opportunity to be heard at a meaningful time and in a meaningful manner. At each of the hearings, he was provided: 1) the opportunity to be represented by counsel; 2) the opportunity to make an oral presentation in response to each specific allegation concerning him; 3) the opportunity to present affidavits, witness statements and any other documents he wished; 4) the opportunity to question and cross-examine the members of the investigative staff; 5) the opportunity to have his case presented to and determined by independent finders of fact; and 6) an opportunity to appeal to another body. Clearly, Tarkanian understoood the charges against him and received ample opportunity to refute those charges and present his case. The gravamen of his complaint is that he was not successful, despite being given the opportunity to succeed.

The opinion of the Court below in this case conflicts with the method of analysis established in this Court's cases and with the holdings of the Circuit Courts of Appeals which have reviewed the NCAA's procedures. The Nevada Supreme Court rejected the considered view of the Eighth Circuit and the District of Columbia Circuit that NCAA enforcement procedures comply with the mandates of procedural due process. In *Howard University v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975), the Court reviewed the same procedures at issue today. It noted that the NCAA gave full notice and full particulars of the charges

alleged, the right to participate and defend the alleged violations before the Committee on Infractions, and the right to appeal an adverse ruling to the NCAA Council. "We think that the NCAA has complied adequately with any due process responsibilities it might have had." *Id.* at 222. In *Regents of University of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977), these same procedures were again reviewed and the Court there held that they "unquestionably afforded due process." *Id.* at 371.

Similarly, the Sixth Circuit has also reached a result contrary to that of the Nevada Supreme Court. In *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987), a case with issues similar to this case, the recipient of a master's degree challenged the University's decision to rescind the degree for alleged improprieties. As in the instant case, the plaintiff received written notice of the allegations against him, and an opportunity to present a written reply to those charges. Following a lengthy hearing before a committee of University professors, at which plaintiff appeared with counsel and examined witnesses, it was determined that the allegations were true. An appeal to the State Board of Regents was taken, and following a hearing, the findings were affirmed. The plaintiff challenged the findings in court, alleging the actions of the University did not comply with constitutional requirements of procedural due process. Following a lengthy trial, which included the transcripts of the earlier hearings, the trial court declared the procedures were inadequate, and found in plaintiff's favor. Ironically, the trial judge erroneously re-weighed the evidence in determining that the plaintiff had not violated University rules, just as the trial court in this case did. The Sixth Circuit, on review, reversed, noting not only that the procedures invoked met due process standards, but also that the trial judge had improperly substituted her judgment on the propriety of the sanctions levied by

the University for those of the fact-finding body assigned that task. The Court also chided the district court's personal criticisms of the University committee.

In sum, the court below departs from clear precedent in holding that NCAA procedures fail to provide due process protections. In focusing on one supposed deficiency, i.e., the lack of affidavits from NCAA sources, it ignores the tremendous amount of process Tarkanian did receive. It failed to balance the relative interests of the parties, or at best did so with its thumb on the scales. This analysis is contrary to this Court's requirements, as set out in *Mathews v. Eldridge*, thereby warranting review by this Court.

III. Substantive Due Process

The trial court below held that the NCAA's action in recommending Tarkanian's temporary suspension from coaching violated his right to substantive due process. Although this holding was briefed extensively to the Nevada Supreme Court, that Court affirmed the holding without comment. (App. B, *infra.*) We raise the issue for consideration by this Court only because the failure of the court below to eliminate it leaves uncertain its vitality.

The rights and interests which Tarkanian seeks to protect by this litigation spring from state law, i.e., his employment contract with the University and his rights, if any, under state tenure laws. The Circuit Courts of Appeals have disagreed about the availability of substantive due process review when deprivation of state conferred property rights are alleged. The Seventh and Tenth Circuits have held that substantive due process protects only constitutional rights, not state-created rights. *See Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986); *Brown v. Brienen*, 722 F.2d 360, 367 (7th Cir. 1983). The Fifth, Eighth and Eleventh Circuits have held that sub-

stantive due process protects state rights as well as constitutional rights. *See Schaper v. City of Huntsville*, 813 F.2d 709, 717 (5th Cir. 1987); *Barnett v. Housing Authority*, 707 F.2d 1571, 1577 (11th Cir. 1983); *Moore v. Warwick Public School District No. 29*, 794 F.2d 322, 328-29 (8th Cir. 1986).

Justice Powell addressed this issue in his concurring opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. ..... (1985). In *Ewing*, this Court considered the decision of a state university in dismissing a student from its medical program. The student was terminated after achieving on a national exam the lowest score in the history of the school's program. Joining this Court's unanimous opinion that the university had not violated the student's rights, Justice Powell contended that the student was not entitled to the protection of substantive due process, because his interest in a medical degree arose from state law rather than constitutional law. He wrote:

> Even if one assumes the existence of a property right, . . . not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the constitution, substantive due process rights are created only by the constitution.

Id., 474 U.S. at ..... (Powell, J., concurring) (citation omitted).

Tarkanian's interests arise from alleged state tenure and contract rights and therefore offer this Court an opportunity to address the concern of Justice Powell and the conflict among the several circuits cited above. For this reason, certiorari is warranted.

In addition, the holdings of the Nevada state courts that the NCAA's findings and sanctions were arbitrary also warrants this Court's consideration. The hallmark of substantive due process is that state action should not be arbitrary or capricious. *See, Ewing, supra*, 474 U.S. at ..... In an academic setting, "arbitrariness" must be established by showing that the decision is not supported by the facts, or that the reasons given for the decision are unrelated to the educational process. *See Fisher v. Snyder*, 476 F.2d 375, 377 (8th Cir. 1973); *Wishart v. McDonald*, 500 F.2d 1110, 1115 (1st Cir. 1974). Courts reviewing such decisions must not re-weigh the evidence or usurp the judgment of the academic fact finder, but rather should uphold the decisions they make unless unsupported by any evidence. *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

UNLV and the other members of the NCAA, including Tarkanian, voluntarily agreed to conduct their intercollegiate athetic programs in accordance with rules governing the recruiting, admission, eligibilty and financial aid of student-athletes. They further agreed to settle controversies regarding violations of those rules by adjudication before a Committee composed of professors or administrators representing geographically and academically diverse member institutions. Those procedures were followed here. As head basketball coach at a member institution, Tarkanian agreed to this procedure. After arguing his case unsuccessfully through three proceedings before the Committee on Infractions plus additional hearings before the Council and the University (all with the assistance of counsel), Tarkanian sought the protection of his home court.

The trial judge below found that the five members of the NCAA Committee on Infractions and the 16 members of the Council did not have sufficient information to find the violations of which Tarkanian was accused. The trial judge made this determination despite evidence at trial that these committees had taken over 20 hours of testimony, had observed all the witnesses, including Tarkanian, had reviewed hundreds of documents and had

deliberated several hours before reaching their conclusions. In fact, this single man, the trial judge, substituted his judgment for the judgment of 21 others. Ironically, the trial judge did not have before him many of the witnesses who had appeared before these 21 committee members. He had before him none of the affidavits and documents presented by Tarkanian at the hearings before the Committees. The trial judge even indicated at trial that he would not read the transcripts of the hearings.

Even more ironic, this same judge, unbeknownst to petitioner, had been relieved of his judgeship shortly before oral argument of this case to the Nevada Supreme Court. He was forced to resign from the bench on the basis of emotional problems, based upon evidence that he had acted irrationally as a judge as long ago as 1984, the year in which this case was tried. At least one member of the Nevada Supreme Court sat on the committee which recommended his removal.

Thus, a man who was later found to be judicially incompetent was allowed, with the knowledge and acquiescence of the highest court of his state, to substitute his personal judgment, in favor of a popular, local personality, for that of 21 independent teachers and administrators who heard all of the evidence, viewed all of the documents and observed all of the witnesses.

This case brings to this Court the following question: Should the Nevada courts, without reviewing the evidence which had been considered by the designated fact finder, be allowed to substitute their judgment for that of the voluntary association whose rules are at issue. This Court can, and should, grant certiorari in order to answer this question in the negative.

IV. Removal

The NCAA seeks this Court's consideration of the rights of litigants to have the federal courts decide questions of U.S. Constitutional law. Specifically, the NCAA submits that the removal statute should be construed to permit U.S. District Courts to inquire whether a defendant was joined, or not joined initially, for the sole purpose of defeating removal.

The Nevada courts held, erroneously, we believe, that the NCAA's conduct was state action and that it deprived Tarkanian of constitutionally protected rights.

This Court has spoken in cases where the parties have colluded to create or destroy diversity jurisdiction.[7] Existing case law, however, has not settled the issue fairly in cases where parties have acted to defeat federal question jurisdiction.

In this case, it became increasingly clear as the litigation progressed that the joint and separate actions of Tarkanian and UNLV were designed to and succeeded in defeating the NCAA's right to have the federal courts decide Tarkanian's claim that he had been deprived of the protections guaranteed by the U.S. Constitution.[8] The

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7. *See, e.g., Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931); *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969).

8. The "friendly" nature of the lawsuit brought by Tarkanian "against" the University originally, and the animosity of both Tarkanian and the University toward the NCAA concerning the matters which are the subject of this litigation, has persisted since the NCAA first began its investigation of allegations concerning Tarkanian. The University's hearing (following Tarkanian's hearing before the NCAA Council) was utilized as a forum for both the University and Tarkanian to attack the NCAA and set the stage for their forthcoming "friendly" lawsuit. Two days after this hearing, Tarkanian in fact filed suit. The NCAA was not named as a defendant in that suit. Despite well-founded and reasonable requests by the NCAA,

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NCAA twice unsuccessfully sought to remove this case to federal court.

Tarkanian brought suit "against" UNLV on September 8, 1977, claiming that UNLV's temporary suspension of his head coaching duties denied him rights guaranteed by the Fourteenth Amendment. The NCAA was not named as a defendant, and UNLV declined to remove the case to federal court. The Nevada Supreme Court later determined that the NCAA was an indispensable party to the action. (App. E, *infra.*) Within thirty days following the date the NCAA was joined as a defendant with the claim that the NCAA's enforcement procedures deprived

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Footnote continued—

the University refused to remove the case to federal court, preferring instead to remain in the state court of the home state of both itself and Tarkanian. This allowed Tarkanian and the University to "litigate" their case (at least initially) in their home court free from the encumbrances of such details as contested issues.

At the trial to consider an injunction against the University, attorneys for the University were allowed to testify regarding privileged matters *for Tarkanian* without objection by the University. Additionally, in its "defense" at the first trial, the University failed to proffer the Expanded Confidential Report, which constituted the written findings of the Committee on Infractions and which was among the most persuasive evidence the University had available to dispute Tarkanian's claims.

Following the granting of an injunction against it, the University reluctantly appealed the decision to the Nevada Supreme Court, which remanded the case and ordered joinder of the NCAA as a party. (Appendix E, *infra,* A61.)

At the 1984 trial of the case, the trial tactics of the University and the evidence offered by its employees and counsel finally and conclusively established its alliance with Tarkanian in their battle against enforcement of the findings and sanctions recommended by the Committee on Infractions and NCAA Council. At the close of the second trial, a permanent injunction was entered against the University, from which it has chosen not to appeal. At hearings on attorneys fees, both the University and Tarkanian argued that Tarkanian's case was mainly against the NCAA, the University noting that it would not have sought suspension of Tarkanian but for what it perceived to be a mandate of the NCAA.

plaintiff of rights guaranteed by the Fourteenth Amendment, however, defendants petitioned for removal of the case to federal court. The U.S. District Court remanded the case to state court, believing itself bound by those cases construing the removal statute which suggest that the right to removal was destroyed by UNLV when it failed to remove within thirty days of service of process in 1977. (App. H, *infra.*) Following trial of the case and receipt of the trial court's memorandum decision, a second petition for removal was filed based upon the clear evidence that Tarkanian's and UNLV's interests were identical. Although the court had earlier noted that "the true adversity of the original parties might reasonably be questioned," (App. H, *infra,* A79), the U.S. District Court again ordered remand. (App. J, *infra.*)

The trend in the analogous case law indicates such frustration of the policy of the removal statute by Tarkanian and UNLV was improper.

Prior to 1969, this Court had declined to inquire into the motives of a plaintiff in joining a defendant in order to create or destroy diversity jurisdiction.[9] This Court's holding in *Kramer v. Caribbean Mills, Inc.,* 394 U.S. 823 (1969), however, engaged in just such an inquiry. *Kramer* held that the U.S. District Court lacked diversity jurisdiction because an assignment of a contractual interest to the plaintiff, admittedly motivated in substantial part by a desire to make diversity jurisdiction available, had been "improperly or collusively made" to invoke jurisdiction, within the meaning of 28 U.S.C. §1359.[10] *Id.* at 830.

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9. *See, e.g., Provident Savings Life Assurance Society v. Ford,* 114 U.S. 635, 641 (1885); *Oakley v. Goodnow,* 118 U.S. 43, 44 (1886); *Mecom v. Fitzsimmons Drilling Co.,* 284 U.S. 183, 189 (1931).

10. The statutory provision construed by this Court in *Kramer,* 28 U.S.C. §1359, provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Many lower federal courts seem to have accepted the *Kramer* case as burying *Mecom* and its predecessors.[11]

In *Miller v. Perry, supra,* 456 F.2d at 67, the Fourth Circuit concluded that, under *Kramer,* federal courts are now free to inquire into the motives of those seeking appointment of administrators for the purpose of either *creating or prohibiting* federal court diversity jurisdiction. The *Miller* court recognized that the difference between collusive attempts to create and to destroy diversity jurisdiction "is insignificant." *Id.* at 66.[12]

The difference between collusive attempts to avoid removal on grounds of diversity jurisdiction and collusive attempts to avoid removal on grounds of the existence of a federal question seems equally significant.[13] In both

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11. *See, e.g., Pallazola v. Rucker,* 797 F.2d 1116, 1120 (1st Cir. 1986); *O'Brien v. Avco Corp.,* 425 F.2d 1030, 1033 (2nd Cir. 1969); *Prudential Oil Corp. v. Phillips Petroleum Co.,* 546 F.2d 469, 474 (2nd Cir. 1976); *Miller v. Perry,* 456 F.2d 63, 67 (4th Cir. 1972); *Bishop v. Hendricks,* 495 F.2d 289, 296 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974); *Bass v. Texas Power & Light Co.,* 432 F.2d 763 (5th Cir. 1970), *cert. denied,* 401 U.S. 975 (1971); *Bianca v. Parke-Davis Pharmaceutical Div.,* 723 F.2d 392, 395 (5th Cir. 1984); *Gross v. Hougland,* 712 F.2d 1034, 1037 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984); *Betar v. DeHavilland Aircraft of Canada, Ltd.,* 603 F.2d 30, 33 (7th Cir. 1979), *cert. denied,* 444 U.S. 1098 (1980); *North Amer. Watch Corp. v. Princess Ermine Jewels,* 786 F.2d 1447, 1450 (9th Cir. 1986); *Hackney v. Newman Memorial Hospital, Inc.,* 621 F.2d 1069, 1070 (10th Cir.), *cert. denied,* 449 U.S. 982 (1980). *See also Piquet v. Amoco Production Co.,* 513 F.Supp. 938, 942 (M.D.La. 1981). *But cf. Field v. Volkswagenwerk AG,* 626 F.2d 293, 303 (3rd Cir. 1980); *Krier-Hawthorne v. Beam,* 728 F.2d 658, 661 (4th Cir. 1984).

12. *See also Wecker v. National Enameling & Stamping Co.,* 204 U.S. 176, 186 (1907) ("[T]he federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right . . . ."); *Vidmar Buick Co. v. General Motors Corp.,* 624 F.Supp. 704, 707 (N.D.Ill. 1985); *Douglas Energy of New York Inc. v. Mobil Oil Corp.,* 585 F.Supp. 546, 548 (D.Kan. 1984).

13. Indeed, collusive attempts to avoid removal of cases involving federal question jurisdiction are clearly more abhorrant in light of the clear congressional intent, expressed in 28

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situations, the courts should examine the facts in order to determine whether collusion is being utilized to defeat federal court jurisdiction. To date, courts feel bound by judicially created law which forbids such inquiry in federal question cases, but rather requires rote adherence to the notion that all parties designated by plaintiff as defendants must join in removal.[14]

Under the law as it stands, regardless of their rights granted by 28 U.S.C. §1441 to litigate in federal court, a defendant joined in a suit after a friendly defendant has declined to remove is powerless to remove because of the case law holding that the original non-adverse defendant waived the removal rights of *all* defendants. Thus, the law as it now stands would seem to allow a plaintiff with a claim arising under the laws of the United States to sue in state court a non-adverse party for redress of such a claim and wait until the time for removal has lapsed before joining his true adversary.

This Court has the power to and should construe the removal statute to allow U.S. District Courts to consider and weigh the interests of defendants who seek to remove cases involving real issues of federal law, regardless of when such defendants are made parties to such suits, rather than construing the statute to allow non-adverse defendants to waive and destroy forever and for all subsequent defendants the right to litigate such questions in the federal courts. This presents an appropriate question for this Court to consider.

Footnote continued—

U.S.C. §1441(b), that litigants be provided a federal forum for resolution of issues involving federal questions "without regard to the citizenship or resident of the parties." 28 U.S.C. §1441(b).

14. *See, e.g.,* 1A J. Moore, *Moore's Federal Practice* ¶0.168 [3.-2], p. 547 (1987); *Godman v. Sears, Roebuck & Co.,* 588 F. Supp. 121, 123 (E.D. Mich. 1984); App. H, *infra,* A77.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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